

HOW MUCH IS TOO MUCH? COPYRIGHT PROTECTION OF
SHORT PORTIONS OF TEXT IN THE UNITED STATES AND
EUROPEAN UNION AFTER *INFOPAQ INTERNATIONAL A/S V.*
DANSKE DAGBLADES

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ABSTRACT

The recent case Infopaq International A/S v. Danske Dagblades Forening decided by the Court of Justice for the European Union could influence businesses that summarize or aggregate content. Under this ruling, excerpts of copyrighted material unproblematic in the United States could invite liability if reproduced in European Union member states. In the United States, copying words or phrases only infringes a copyright where those words or phrases are particularly unique or core to the original work. By contrast, the European Union Information Society Directive provides an exclusive right to even partial reproductions. In the Infopaq case, the European Court of Justice read the Directive to apply to eleven-word sentence fragments so long as those fragments demonstrated the author's intellectual creation. This article will examine the standards for copyright infringement of small sections of text in the United States and European Union after Infopaq.

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INTRODUCTION

In the United States, copyright law generally does not protect against fragmentary copying of single words or short phrases. The recent Court of Justice for the European Union (“ECJ”) decision in the case *Infopaq International A/S v. Danske Dagblades Forening*¹ indicates protections in the European Union (“EU”) may apply to such fragmentary copying. That case interpreted the EU Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (“the Information Society Directive”) to apply to eleven-word fragments copied from news articles where those fragments demonstrated the intellectual creation of the author. Because this ruling eliminates the possibility of a *de minimis* defense, EU protection of short text fragments is likely greater than that in the United States. However, disputes as to what qualifies as “intellectual creation” leave the exact contours of the right unclear.

This Article will examine treatment of fragmented copying in the United States, consider the EU Information Society Directive and the

¹ Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening* [2009] ECR I-6569, available at http://curia.europa.eu/jcms/jcms/j_6 (search case no. c-5/08; then follow hyperlink labeled Judgment 2009-07-16).

impact of *Infopaq*, and compare the United States and EU approaches.

I. LAW IN THE UNITED STATES TREATS COPYING OF WORDS OR PHRASES AS NON-INFRINGEMENT IN MOST CASES

Under United States copyright law a defendant who copies short fragments of text can make two primary arguments that are based on the brevity of the copied material. First, a defendant could argue copying is *de minimis* and therefore the plaintiff cannot show substantial similarity necessary to support an infringement claim. Second, a defendant could argue that copying, although “substantial” for the purposes of the *de minimis* test, qualifies as fair use. This section will consider these two arguments in turn.

A. Copying Short Words or Sentences Ordinarily Qualifies as *De Minimis*

To make a *prima facie* case of copyright infringement in the United States, the plaintiff must show a defendant actually copied protected elements of copyrighted work and that defendant’s product is “substantially similar” to the original work.² When copying is so minor the works are not substantially similar, the copying is *de minimis* and the *prima facie* case fails.³

Copyright does not protect all elements of a work, and therefore not all elements are considered when determining if copying rises above *de minimis*. Copyright only protects elements of a work that demonstrate some minimal creativity.⁴ Copyright protection also extends to expression of ideas and facts, but not those ideas and facts themselves.⁵ Factual works such as news articles demonstrate

² 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (Matthew Bender, Rev. Ed. 2010).

³ *Newton v. Diamond*, 349 F.3d 591, 595 (9th Cir. 2003) (“To say that a use is *de minimis* because no audience would recognize the appropriation is thus to say that the works are not substantially similar”).

⁴ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

⁵ *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); *Chicago Record-Herald Co. v. Tribune Ass’n* 275 F. 797, 798-799 (7th Cir. 1921).

originality, if at all, with expressive factors such as arrangement and choice of words.⁶ When a work contains both protected expressive elements and unprotected elements such as facts, a court determines whether the new work infringes by considering what elements are similar between the two and then determining whether copyright protects the similar elements.⁷

In practice, similar or identical words or phrases, without more, generally qualify as *de minimis* and therefore not infringement.⁸ However, courts have held works infringing based on single brief sentences when those sentences demonstrate particular originality or form the core of the protected work. For example, one court held it violated copyright law to use a sentence from the *Night of the Living Dead* screenplay—“When there is no more room in hell . . . the dead will walk the earth”—in the promotional material of a competing film.⁹ Other courts, while holding short copied sections not to infringe, have suggested particularly original or important segments or even single words might merit protection.¹⁰

⁶ *Int'l News*, 248 U.S. at 234; *Chicago Record-Herald*, 275 F. at 799.

⁷ *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134-35 (2d Cir. 2003).

⁸ *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519-20 (1st Cir. 1996) (no substantial similarity based on identical words describing similar radio call-in competition); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (denying protection to the phrase “the most personal form of deodorant”); *Brainard v. Vassar*, 625 F. Supp. 2d 608, 620-21 (M.D. Tenn. 2009) (finding that no reasonable jury could find substantial similarity between defendant’s and plaintiff’s song in spite of one nearly identical line presented in a musically similar way); *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1404 (S.D.N.Y. 1973) (song lyric “Got my mojo working but it just won’t work on you” is a neither particularly unique nor qualitatively important and so will not support a finding of substantial similarity).

⁹ *Dawn Assocs. v. Links*, 203 U.S.P.Q. (BNA) 831 (N.D. Ill. 1978). *See also* *Universal City Studios, Inc. v. Kamar Indus., Inc.*, 217 U.S.P.Q. (BNA) 1162 (S.D. Tex. 1982) (copying “E.T. Phone Home” and “I Love You, E.T.” onto coffee mugs qualifies as copyright infringement).

¹⁰ *Narell v. Freeman*, 872 F.2d 907, 912 (9th Cir. 1989) (suggesting that copying of poetic recitation of history, in contrast to ordinary phrases describing history involved in the case, might qualify as infringement); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 n.8 (2d Cir. 1946) (commenting in passing that highly evocative short phrases could constitute copyright infringement even if small quantitatively); *Life Music, Inc. v. Wonderland Music Co.*, 241 F. Supp. 653, 656

When applying these rules to news article summaries, the United States Court of Appeals for the Second Circuit held one paragraph literally translated from a six paragraph foreign-language article was non-infringing, but held other summaries that copied more than half of articles to be infringement.¹¹ Protection for short text fragments has varied in different courts and cases in the United States.¹² Nonetheless, it appears that most United States courts would treat an eleven-word fragment copied from a news article as non-infringing absent special circumstances.

*B. The Fair Use Doctrine Often Applies to Short, Copied
Fragments*

Unlike a *de minimis* defense, which challenges the elements of copyright infringement, fair use is an affirmative defense. It provides that certain otherwise infringing uses of copyrighted work are valuable and protected from liability. Four statutory factors determine applicability of fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹³ These factors are not isolated from each other but operate together in light of the purposes of copyright.¹⁴ Brevity of copying impacts the first, third and fourth fair-use factors, although there is no amount of copying so small as to be presumptively fair use.¹⁵

The key question in the first fair-use factor is the degree to which defendant’s work is “transformative” of the original, whether it adds

(S.D.N.Y. 1965) (protection for single word “SUPERCALAFALISTICK-ESPEEALADOJUS” “conceivable” if it were original to plaintiff).

¹¹ *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.* 166 F.3d 65, 71 (2d Cir. 1999).

¹² *Compare Dawn Assocs.*, 203 U.S.P.Q. (BNA) at 831 *with Stratchborneo*, 357 F. Supp. at 1404.

¹³ 17 U.S.C § 107 (2006).

¹⁴ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 578 (1994).

¹⁵ *See id.* at 577 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (fair use is not to be determined on the basis of bright line rules)).

something to the original or uses it for a different purpose or in a different manner.¹⁶ Short excerpts from copyrighted works tend to be more transformative than longer sections.¹⁷ The third factor, amount and substantiality of portion used, directly relates to brevity but is not merely quantitative. Courts consider whether the amount copied is reasonable in light of the purpose and character of the alleged fair use.¹⁸ The quantity copied also impacts the fourth fair-use factor, the effect of the use on the potential market for plaintiff's work, because a longer section is more likely to fulfill the market demand for the original.¹⁹

Overall, under United States law, short fragments of copied text do not ordinarily infringe copyright. The *de minimis* defense created by the requirement of substantial similarity allows many short copies to defeat a prima facie showing of copyright infringement. Even when the prima facie case can be made, the fair use defense is often available in cases involving short fragments of text. The result is that copying short fragments, without more, is rarely copyright infringement in the United States. The EU does not offer similar defenses in its copyright harmonization.

II. EU COPYRIGHT DIRECTIVES OFFER AT LEAST AS MUCH, AND PROBABLY MORE, PROTECTION TO COPYRIGHT HOLDERS

In 2001, the European Union mandated strong copyright protections in all member states by adopting the Information Society Directive.²⁰ Previously the EU adopted only piecemeal directives

¹⁶ *Campbell*, 510 U.S. at 578-79 (use of elements of original song for parody is transformative); *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146, 1165 (9th Cir. 2007) (thumbnail images used to point to web sites are transformative compared with the same images used for their aesthetic characteristics).

¹⁷ *Campbell*, 510 U.S. at 587-88; Johnathan Dowell, *Bytes and Pieces: Fragmented Copies, Licensing, and Fair Use in a Digital World*, 86 CALIF. L. REV. 843, 871 (1998).

¹⁸ *Compare Campbell*, 510 U.S. at 588 (parody did not appropriate more than necessary to "conjure up" the object of the parody), *with Harper & Row*, 471 U.S. at 564-565 (relatively short copied passage not fair use because it appropriates "heart of original work").

¹⁹ *Campbell*, 510 U.S. at 587-88.

²⁰ Council Directive 2001/29, 2001 O.J. (L 167) 1, 16 (EC). A directive is a

targeted at areas such as computer programs and databases, but the Information Society Directive addressed all creative works. The Information Society Directive requires member states to grant authors the exclusive right of reproduction of their works in whole or in part.²¹

The exceptions to this exclusive reproduction right are limited, with one required under the Information Society Directive and an exclusive list of exceptions that may be provided at the discretion of member states. The only exception required by the Information Society Directive is for transient copying that occurs as part of a technical process, such as the loading of Web pages into a computer's memory to browse the Internet.²² The Directive also allows member states to provide certain specific exceptions to the exclusive reproduction right. Permissible exceptions include use for teaching or research so long as credit is given, quotations for review or criticism, incidental use in other works, or other "minor" exceptions already existent in member states.²³ As these exceptions are permissive rather than mandatory, persons copying protected works in these ways must look to national law for protection. The Directive does not permit any exception not listed.

Read literally, the Information Society Directive could forbid the copying of even the smallest amount of text, as it provides for exclusive reproduction rights of works "in part" and provides no limit on how much copying is required to qualify as an impermissible "reproduction in part." There is no equivalent to the American substantial similarity test in the Directive. It also lacks an originality requirement, which could provide a limit on liability. Previous EU directives concerning databases and computer programs required originality as a prerequisite for protection, defining originality based on whether the work demonstrated intellectual creation.²⁴ With no

binding act of a EU body that creates an objective member states must work to achieve with national legislation. Unlike regulations, directives create direct effect upon the legal relations between individuals as well as obligations for member state governments. 1 A. G. TOTH, *Directive*, in THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW (1990).

²¹ Council Directive 2001/29, art. 2, 2001 O.J. (L 167) 1, 16 (EC).

²² *Id.* at art. 5.

²³ *Id.*

²⁴ GUY TRITTON ET AL., INTELLECTUAL PROPERTY IN EUROPE 534 (3d ed.

requirement that copied sections demonstrate any amount of originality, in theory even the most minimal amount of copying could be actionable.²⁵

Even were the Information Society Directive to apply the intellectual creation requirement as a prerequisite for protection, the exact meaning of this standard would be unclear. Courts and commentators interpreting intellectual creation in the context of previous EU directives have come to various conclusions.²⁶ Some have considered it the equivalent of the very low standard previously adopted in the United Kingdom and Ireland, which requires only that the work not have been copied.²⁷ Others took the standard to be closer to the old continental standards requiring an author's distinctive stamp to be on the work in order to qualify for copyright protection.²⁸ Several commentators have argued that the best understanding of this standard is as equivalent to the United States originality requirement articulated in *Feist Publications, Inc. v. Rural Telephone Service Co.*, that the element of the work allegedly copied demonstrate some "minimal level of creativity."²⁹

III. THE *INFOPAQ* CASE

The European Court of Justice ("ECJ") addressed the question of how much copying could be actionable under the Information Society Directive in the case of *Infopaq International A/S v. Danske Dagblades Forening*.³⁰ Infopaq is a Danish media monitoring company.³¹ The company scans news media into a computer database

2008).

²⁵ *Id.*

²⁶ Joris Deen, *Originality in Software Law: Belgian Doctrine and Jurisprudence Remain Divided*, 2 J. INTELL. PROP. L. & PRAC. 692, 694 (2007).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; Estelle Derclaye, *Software Copyright Protection: Can Europe Learn from American Case Law?* 22 EURO, INTELL. PROP. REV. 56, 65-66 (2000).

³⁰ Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening* [2009] ECR I-6569, available at http://curia.europa.eu/jcms/jcms/j_6 (search case no. c-5/08; then follow hyperlink labeled Judgment 2009-07-16).

³¹ *About Infopaq*, INFOPAQ, <http://www.infopaq.net/about.pab> (last visited Jan. 21, 2011).

and searches for keywords clients ask them to monitor. Infopaq then provides clients with “summaries” of news articles, consisting of the keyword and the five words before and after.³² Danske Dagblades Forening, an association of Danish newspapers, approached Infopaq and asserted that Infopaq required permission to copy the works of its members.³³ Infopaq disagreed and sued for a declaratory judgment that it had the right to capture data from newspapers.³⁴

The lower court denied the claim for declaratory judgment.³⁵ Infopaq appealed to the Dutch Supreme Court, the Højesteret, which referred several questions to the European Court of Justice.³⁶ The court asked whether eleven-word fragments like the ones Infopaq generated could qualify as reproduction in part for the Information Society Directive.³⁷

The ECJ concluded that eleven-word fragments can constitute impermissible reproduction in part, so long as those fragments convey the intellectual creation of the original author. The ECJ first held that the Information Society Directive required interpretation in light of the general purposes of international copyright protection.³⁸ The court then argued that the Berne Convention embodies the principle that protecting a work presupposes that the work is an “intellectual creation,” and also pointed to the use of this “intellectual creation” standard in previous EU directives.³⁹

Based on this analysis, the ECJ held that although the term does not appear in the Information Society Directive, the directive protects

³² Opinion of Advocate General Trstenjak, Case C5/08, *Infopaq International A/S v. Danske Dagblades Forening* http://curia.europa.eu/jcms/jcms/j_6 (search case no. c-5/08; then follow hyperlink labeled Opinion 2009-02-12), para. 9-15.

³³ *Id.* at para. 16.

³⁴ *Id.* at para. 17.

³⁵ *Id.*

³⁶ *Id.* at para. 20. This is a procedure known as a referral for a preliminary ruling, wherein the ECJ provides responses to questions concerning the interpretation of Community law in the context of ongoing national litigation. It is an interim step; after the issuance of the preliminary ruling, the national court will determine the disputed issues in light of the ECJ’s ruling. 1 TOTH, *supra* note 20, at 415-16.

³⁷ *Infopaq*, [2009] ECR I-6569 at para. 26.

³⁸ *Id.* at para. 32 (Citing Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 2006 ECR I-11519 (2006)).

³⁹ *Id.* at para. 34-35.

works only to the extent that they represent the author's intellectual creation.⁴⁰ The Information Society Directive treats parts of works in the same way as it treats whole works.⁴¹ Therefore the ECJ held that the exclusive reproduction right applies to parts of works if and only if those parts manifest intellectual creation.⁴²

The court provided some guidance as to what this intellectual creation requirement would mean in the context of a news article. Such intellectual creation would be manifested, if at all, in the form and manner of the subject's presentation and the author's linguistic expression.⁴³ Individual words could not manifest this intellectual creation, but the arrangement or selection of such words could.⁴⁴ The court refused to rule out the possibility that an eleven-word fragment could manifest intellectual creation.⁴⁵ However, the ECJ left final determination of whether, as a factual matter, the eleven-word fragments in this case manifested intellectual creation with the national court.⁴⁶

IV. COMPARISON OF UNITED STATES AND EU COPYRIGHT PROTECTION OF SHORT FRAGMENTS AFTER *INFOPAQ*

Because final determination of whether the fragments in question manifested intellectual creation rests with the national court, the exact meaning of intellectual creation remains unclear. The court's discussions of the selection and arrangement of words supports the idea that this intellectual creation standard may be very similar to the originality requirement articulated in the United States Supreme Court's opinion in *Feist Publications*.⁴⁷ Like the ECJ in *Infopaq*, the United States Supreme Court in *Feist Publications* looked to selection and arrangement of unprotected elements—in that case phone numbers—to determine whether any minimum level of

⁴⁰ *Id.* at para. 37.

⁴¹ *Id.* at para. 38.

⁴² *Id.* at para. 39.

⁴³ *Id.* at para. 44.

⁴⁴ *Id.* at para. 45.

⁴⁵ *Id.* at para. 47-48.

⁴⁶ *Id.* at para. 51.

⁴⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

originality existed in the original work.⁴⁸

If the intellectual creation standard used in EU law is equal to or lower than the originality standard applied in the United States, then *Infopaq* means that short fragments of text will be subject to much stronger protection in Europe than in the United States. In the United States, the originality question is only the first part of the infringement analysis for short fragments of text. *Infopaq*, by contrast, does not apply any substantial similarity requirement as part of the definition of reproduction in part—if the originality threshold is met, reproduction is proven.

EU protection of copyright for short fragments would also be stronger than equivalent protections in the United States because of the different treatment of fair use under the Information Society Directive. While the equivalent of a fair use defense is determined at the national level, national discretion in that area is limited to the list of allowable exceptions the Information Society Directive. This is in contrast to the open-ended four-part test used in the United States, which allows many uses of short fragments of text as fair use even if they rise above the level of *de minimis*.

The intellectual creation requirement may be somewhat helpful, however, to persons excerpting news articles. Because intellectual creation in news articles can only be demonstrated by selection or arrangement of words, a summary of a news article that paraphrases the original should not violate the exclusive reproduction right.⁴⁹ If European courts interpret intellectual creation to require something more than the minimal creativity required in the United States, it is possible that treatment of small excerpts will be very similar in Europe and the United States. If a short segment is required to demonstrate some personal stamp of the author, as was required under the originality thresholds of several countries prior to the copyright harmonization directives, the treatment of short segments might also provide protection only when such short segments are especially unique. This would create protection very similar to that in the United States.

⁴⁸ *Id.* at 348.

⁴⁹ *Infopaq*, [2009] ECR I-6569 at para. 23 (“the parties in the main proceedings do not dispute that genuinely independent summary writing per se is lawful and does not require consent from the rightholders”).

CONCLUSION: EXCERPTS IN EUROPE MAY INFRINGE COPYRIGHT

While the precise contours of the exclusive reproduction right will not be clear until a consensus emerges as to the meaning of “intellectual creation,” *Infopaq* still suggests that EU copyright protections may be stronger than those in the United States. The *de minimis* defense in the United States will ordinarily allow copying of short fragments so long as they are not especially unique or key to the original work. Even if a copied section is too extensive to be *de minimis*, if the new work adds something or uses the section for a different purpose than the original, fair use will often apply. By contrast, the fact that the European Court of Justice does not apply any substantial similarity test to copying opens the door to national courts finding illegal reproduction when fragments of sentences are copied so long as the arrangement and choice of words demonstrates some minimal creativity.